

United Standard Energy Savers, Inc. a/k/a United Standard Water Systems and Plumbers and Pipe Fitters Union Local 598, affiliated with United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO.
Cases 19-CA-15614 and 19-RC-10678

31 July 1984

DECISION, ORDER, AND DIRECTION

BY CHAIRMAN DOTSON AND MEMBERS
HUNTER AND DENNIS

On 30 March 1984 Administrative Law Judge Gerald A. Wacknov issued the attached decision. The Charging Party filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,¹ and conclusions and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

DIRECTION

The representation proceeding is remanded to the Regional Director for Region 19 who is directed to open and count the ballots of Jerry Elder and thereafter to issue a revised tally of ballots and an appropriate certification.

¹ The Charging Party has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

DECISION

STATEMENT OF THE CASE

GERALD A. WACKNOV, Administrative Law Judge. Pursuant to notice, a hearing with respect to this matter was held before me in Richland, Washington, on December 20, 21, and 22, 1983.¹ The initial charge was filed on

¹ All dates or time periods herein are within 1983 unless otherwise specified. The hearing was opened by conference call on October 25, 1983, during which proceeding I granted the Respondent's motion to reschedule the hearing.

271 NLRB No. 114

April 15 by Plumbers and Pipe Fitters Union Local 598, affiliated with United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO (the Union).

Thereafter, on May 18, the Regional Director for Region 19 of the National Labor Relations Board (the Board) issued a complaint and notice of hearing alleging a violation by United Standard Energy Savers, Inc. a/k/a United Standard Water Systems (Respondent) of Section 8(a)(1) and (3) of the National Labor Relations Act (the Act).

Pursuant to a representation petition filed by the Union on February 14, in Case 19-RC-10678, an election by secret ballot was conducted on March 30. The tally of ballots reflects that of the approximately six eligible employees, three cast ballots for the Union and three cast ballots against the Union. There were five challenged ballots. Thereafter, on April 6, the Union filed timely objections to the election. On May 18, the Regional Director issued a supplemental decision and direction of hearing and an order consolidating cases whereby the challenges and objections in the representation proceeding were consolidated with the unfair labor practice proceeding for the purpose of hearing ruling and decision by an administrative law judge.

The parties were afforded a full opportunity to be heard, to call, to examine and cross-examine witnesses, and to introduce relevant evidence. Since the close of the hearing, briefs have been received from the General Counsel, counsel for Respondent and counsel for the Charging Party.

On the entire record, and based upon my observation of the witnesses and consideration of the briefs submitted, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a Washington state corporation, maintains its office and principal place of business in Kennewick, Washington, where it is engaged in the business of selling, installing, and servicing water conditioning and solar equipment. In the course and conduct of its business operations, Respondent has annual gross sales of goods and services valued in excess of \$500,000, and annually purchases goods and materials valued in excess of \$50,000 directly from sources outside the State of Washington, or from suppliers within said State which in turn obtained such goods and materials directly from sources outside said State.

It is admitted and I find that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

It is admitted that the Union is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Issues*

The principle issues raised by the pleadings are whether the Respondent interrogated, threatened, and changed the work conditions of employees, and discharged employees in violation of the Act; and whether, as a result of such conduct, a bargaining order is warranted. Further issues involve the determination of related election objections and the disposition of challenged ballots.

B. *The Facts*

The Respondent is a distributorship engaged in selling, installing, and servicing water conditioning and solar heating systems. In early February, the Respondent's president, Gordon Buley, demoted its installation manager, Daniel Wright, to the status of a rank-and-file installer. Wright's duties as installation manager had been to coordinate the work force, distribute the necessary materials and equipment to the installers, inspect their work, and handle any service or public relations problems. He also hired several employees, and recommended the hiring of other employees. He was clearly a supervisor within the meaning of Section 2(11) of the Act. Buley replaced Wright with a new installation manager, Donald Hanson. Hanson is Buley's brother-in-law, and had been working for the Respondent in the sales department only since December 1982. Hanson, according to Wright, was being "phased in" during the week preceding Wright's demotion.

Wright acknowledged that in January and February there was a great deal of instability and concern over the viability of Respondent's business operations, and several representatives from Respondent's principal supplier, United Standard Management Corporation, spent a considerable amount of time at Respondent's premises reviewing the Respondent's entire operations, including the installation department. The installation employees were then being compensated on a salary basis, and the individuals performing the review, Richard Diefendorf and Mike Kreiser, recommended that the Company commence to pay its employees on a piecework basis which, in their opinion, would benefit both the Respondent and the employees. Further, another significant recommendation was that the Company eliminate Wright from his supervisory position and put him back into the field as a full-time installer. Wright testified that he "was more or less locked out" of any of the meetings during which the foregoing changes were discussed. He did, however, express his opinion to Gordon Buley that, under the piecework proposals which were then under consideration, "there would have been no way that anybody could've even made a living," and therefore he did not believe the installers would agree to work under such a system.

Wright characterized himself as the "buffer" between Respondent's principal managers, Buley and his brother, Steven Buley, Respondent's vice-president, and the installation crew. He acknowledged that the Company "from day one" communicated, stressed, and reiterated through training courses and brochures that a "positive

attitude" is of primary significance. Wright further testified as follows:

Q. Do you recall any discussions with Gordon Buley during the latter part of January and February about the fact that the crew seemed to be having an attitude problem?

A. There was a problem with the attitude, but it came from working an awful lot of hours without any compensation.

Q. So the crew was unhappy and Gordon Buley knew the crew was unhappy, is that correct?

A. The crew was unhappy, but the attitude that they took and were taking was one of they were waiting on me to make things better. I had given them that promise and that I would get things straightened out.

The employees were not pleased that Hanson had replaced Wright. Employee Ricky Hlawek, an installer, testified that "everybody" was giving Hanson "static." Explaining, Hlawek stated:

... I guess he [Hanson] was supposed to have more authority than they [the installation crew] thought he did, so nobody did anything that he said. If he had orders to give to tell somebody to do something else, they wouldn't do it unless somebody else said it.

Employee Dave Hammond testified that he recalled that at a regular weekly meeting, Gordon Buley told the employees not to give Hanson such a hard time. Employee Robert Jones testified that some of the incidents involving the employees' treatment of Hanson simply constituted "kidding" that was taken the wrong way, but that on "a couple of occasions it was out and out harassment towards him."

Harold Sanders, an installer, worked for the Respondent from September 1982 until February 1983. On February 9, he went to the union hall to inquire about union representation, and signed a union authorization card. On the following morning, February 10, in a parking lot across the street from Respondent's premises, he distributed cards to the other approximately eight installers, and each of them signed an authorization card. Sanders collected them and returned them to the Union.

Hlawek testified that he was riding in a truck with Gordon Buley on the afternoon of February 10. Buley asked what was going on at the shop, and mentioned that he was upset because the employees would not listen to Hanson. Hlawek was noncommittal. According to Hlawek, Buley said something about everybody having a bad attitude lately, and then said, "Maybe I ought to fire the whole bunch of you." Hlawek did not ask what Buley was referring to, and believed, from the context of the conversation, that it involved the fact that everybody was giving Hanson "a lot of static."

Donald Hanson testified that he had a good relationship with the installers when he was a salesman, but that when he replaced Wright the employees treated him differently. Hanson testified that on the morning of Febru-

ary 11, while he was giving instructions to employees Mike Stong and Mark Overstreet, who were sitting in a truck, Stong just drove off and left him standing there talking to himself. Apparently, a number of other employees were present. As a result, Hanson became very upset and went to speak to Harold Sanders, Mike Stong's partner for water installations. Hanson told Harold Sanders to tell Stong that he didn't appreciate his conduct. Sanders, according to Hanson, replied, "I'm not your god-damned messenger boy." Hanson immediately reported the matter to Gordon Buley. Neither Stong nor Harold Sanders, both of whom were called as witnesses by the General Counsel, attempted to rebut Hanson's testimony in this regard. Hanson testified that a meeting of all the installers had been scheduled for the morning of Friday, February 11, to discuss piecework. The meeting had been postponed from the preceding day because of the scheduled workload.

Immediately after Hanson reported the incident to him, Gordon Buley summoned the employees, approximately eight individuals, to a meeting. According to Stong, Buley stated that the installations were costing entirely too much and that something had to be done. He thereupon discharged the entire crew. According to Stong and Harold Sanders, Buley's words were to the effect that "if you play fucky-fuck with me I can play the game too." He then instructed them to turn in their equipment from their trucks. According to Wright, Buley said something to the effect that he was tired of playing games, that all the installers were fired and should turn in their uniforms and equipment, and would receive a full week's pay. According to Robert Jones, Buley said he was tired of all the "B.S." coming from the installers and was not going to take that anymore, and that if we wanted to play games he could play games too.

Immediately thereafter, as the employees were removing equipment from their trucks, Buley approached them and asked if they would be interested in working on a piecework basis. After some conversation, the installers were invited back to the meeting room and Buley explained the piecework plan. The record shows that although the employees would be paid a predetermined sum for each installation, they would nevertheless be employees of the Respondent, rather than independent contractors. Buley then told the employees that they could meet with him individually if they were interested. All the employees were interested. Individual meetings were scheduled and occurred later that morning.

During Dave Hammond's individual meeting, he told Buley that all of the employees had signed union cards, and asked whether they had been fired because they joined the Union. Hammond testified that Buley seemed to be surprised, and replied that he had not known anything about the union activity. Buley further stated that the Company had been working on the piecework plan for a long time. Hammond testified that Buley had mentioned the piecework concept to him personally on a previous occasion when Hammond complained about the salary he was receiving.

Robert Jones also mentioned the Union during his private interview. Jones told Buley that he had signed an

authorization card and explained that he signed it because he was afraid of losing his job, and that it was a stupid idea. Buley said, "Yeah, it was a stupid thing." Buley then said some other things about the Union which Jones did not specify.

According to Mark Overstreet, Buley told him during the private conversation regarding piecework that "there was a few people that wanted the Union and that he couldn't afford to pay the union wages."²

Michael Stong testified that during his interview Buley said he knew about the Union and how it got started. He said that Harold Sanders was the instigator behind it and that he didn't like instigators, and added that he felt that Sanders, who had been working on installations with Stong, probably wouldn't be working with Stong any longer. He apparently asked Stong whether he would prefer to work by himself or with a helper, and Stong replied that it made no difference.³

Harold Sanders gave the following account of the personal interview. Buley said, according to Sanders, "Well, you horse's ass, what're you trying to do to me?" Sanders explained to him that he had no idea of what he was talking about. Buley said he was "tired of going the extra mile for us and gettin' shit on by us." Sanders said that he sympathized with him and knew just how he felt because the employees put in long hard hours and also felt that they had been "shit on by the company." Then Buley explained the piecework plan in greater detail and asked Sanders if he would still be interested in working on a piecework basis. Sanders said that he guessed that was up to Buley. Buley explained that to obtain work, Sanders should call in every morning, and, if there was work available, then he would receive it. At this time during the conversation, Sanders told him that he had been to the Union and that the employees had signed union cards. Buley said, according to Sanders, "I don't know what good you think the Union's going to do ya. I'll just close the doors before I'll let the Union come in." Sanders worked that afternoon and the following day, Saturday, under the old method of pay. The following Monday, February 14, he and Stong were assigned an installation job by Gordon Buley. Sanders called in the following morning, Tuesday, and asked Hanson if there was any work that day. Hanson said, according to Sanders, something to the effect that he did not believe there would be any more work "for somebody of your kind" or that the Company had no more work for "troublemakers." Sanders testified that he told Hanson he was just a "broom pusher," and added that he did not believe Hanson had the authority to say there was no more work for him. The conversation became heated, and Hanson hung up. Sanders called back and asked to talk to Buley, but Buley was not available.

Sanders called Buley the next morning to see if there was any work. Buley, according to Sanders, said that he did not appreciate him calling Hanson a broom pusher. Sanders again asked if there was any work, or whether he was fired or laid off. Buley stated, "Well, I don't

² It is not alleged in the complaint that this conversation is violative of the Act.

³ This conversation is not alleged to be violative of the Act.

really need your kind around here. I can do without troublemakers." Sanders asked whether he could take that as meaning he was fired or laid off, and again explained to him that he needed to know. Buley replied, "Let me put it this way, you son of a bitch, I don't ever want to see your fuckin' face here ever again." Sanders did not call thereafter.

Daniel Wright testified that the word union was never mentioned in any discussions he had with Gordon Buley. On Wednesday, February 16, Wright was in Buley's office discussing other matters and, according to Wright, "just out of the blue he [Buley] said he was going to get rid of Harold Sanders because Harold was a fuckin' instigator and that when he had problems with people like that he just, pshaw, got rid of them and that'd take care of the problem." Buley also said, according to Wright, "that he liked Harold, thought Harold was a great guy and all that but he just couldn't have people like that around him."

George Sanders, Harold Sanders' brother, was a mechanic who serviced the Company's vehicles, and was also an installer. Unlike the other installers who had been paid a salary, George Sanders was paid on an hourly basis. He signed a union card, but was not present on Friday, February 11. He reported to work on Monday, February 14, but apparently there was no work available for him and he was sent home. He waited until Wednesday to call in and was again told by the receptionist that there was no work. George Sanders testified that he called in on four or five occasions thereafter and on each occasion was told there was no work. Two or three weeks later he went to Respondent's premises and talked to Gordon Buley, again asking for work. Buley, according to Sanders, told him that "When we've got work for you, we'll call you." He was never called. Hanson testified that to his knowledge George Sanders never called in for work after February 14.

There was a meeting on Monday, February 14, attended by all the employees, and available work was distributed. The employees were told that they need not appear for work each morning, but should call in for their assignments. Donald Hanson testified that, apparently on Tuesday, Harold Sanders phoned and asked him if there was work. Hanson said no. According to Hanson, Sanders did not call him a "broom pusher" but rather said, "What are you? Gordon's suck-suck moron?" Hanson said he was not Gordon's moron, and Sanders continued berating him until Hanson hung up. Sanders called several days later and asked if there was any work. Hanson said there was no work available, and Sanders became upset and again proceeded to berate Hanson. Gordon Buley was present and Hanson handed the phone to him. Buley told Sanders, according to Hanson, "Hey, if you're going to have that type of attitude don't even bother coming back in."

Hanson said he had always tried to be congenial toward Harold Sanders, but Sanders seemed to go out of his way to irritate him. Apparently during the week of February 14, another incident occurred. Sanders had a company trailer stored at his home and was told to return it to Respondent's premises. Sanders did so, and Hanson was attempting to unhitch it from the vehicle.

He asked Sanders how to unhitch it, and Sanders made some derogatory remark and said, "I don't get paid to think." Bob Jones, an employee, was standing nearby and helped Hanson remove the trailer.

Gordon Buley testified that the determination to pay the installers on a piecework basis had been contemplated for a month or so, and was ultimately decided upon on February 4. The final decision on the method of compensation for piecework, however, was made on the night of February 9, and a meeting was initially scheduled for Thursday morning, February 10, to discuss the matter with the installers. The meeting, however, was rescheduled to the next day, Friday, February 11, because of the workload.

On Friday morning, February 11, Gordon Buley observed that Hanson was noticeably upset, and Hanson explained the incident that had just occurred between him and Mike Stong and Harold Sanders. Buley testified that he became outraged over the employees' disrespect for and treatment of Hanson since he had taken over Wright's position. As a result, Buley walked into the meeting room where the employees were assembled, told them that he had "had it" because of their attitude, and then discharged them. Thereafter, on regaining his composure, he told the employees who were then unloading their trucks, that he had intended to discuss the piecework system that morning. Some questions were asked about the system, and he invited the employees back into the meeting room, where piecework was discussed at length. He then told the employees that if they were interested, they could make an appointment to see him individually.

Buley testified that he did not become aware of the union activity until his personal interview with Dave Hammond, who told him that all the employees had signed union cards the day before. Buley further testified that during the course of the individual meetings he never interrogated any employee about the Union, and never mentioned the possibility of closing down the business because of the Union.

On the following Monday, February 14, George Sanders asked him if he still had a job. Buley told him to call Hanson to find out if there was work available. Buley testified that he never talked to George Sanders thereafter, and that Sanders was not contacted by Respondent because, as discussed below, George Sanders was considered to be an undesirable employee.

Buley testified that on Tuesday, February 15, he learned that Harold Sanders had called Hanson his "suck-suck moron." The next day he noticed Hanson speaking on the phone and could tell by the look on Hanson's face that he was again being berated by Sanders. Hanson handed Buley the phone, and Buley said, "Harold, if you're going to have that type of attitude, you don't need to call in." He did not discharge Sanders at that time. Thereafter, he never heard from Sanders. Buley testified that he personally liked Sanders, and acknowledged that Harold Sanders' work was of very high quality.

Vicki Bogenberger, Respondent's former office manager, testified that George Sanders began working for the

Company in December 1982. Four other female employees, occupying various office positions, also worked in the office. Bogenberger testified that George Sanders would come into the office frequently, and his vulgar language was offensive to the clericals, who would complain to Bogenberger. Moreover, Bogenberger was concerned that Sanders would not hesitate to use such language while customers were present. She, in turn, complained to Steve Buley about Sanders' language in early January. Sanders displayed his preference for such language during the course of his testimony at the hearing, and it was stipulated by the parties that Sanders, on a regular and indiscriminate basis, was prone to customarily interject and punctuate his remarks with expletives regardless of who might be present. It was also stipulated that Dale Ann Buley, Gordon Buley's wife, who was a secretary in the office, complained to her husband about Sanders' foul language in late January.

Steven Buley testified that during the first or second week in January he discussed the matter with George Sanders, after Office Manager Bogenberger had adamantly insisted that he do so. Buley told Sanders that his crude language was causing considerable consternation among the office staff, that it could also affect the decisions of potential customers to purchase Respondent's product, and that such language was unacceptable. At that time Sanders said he would try to make an effort to improve.

C. Analysis and Conclusions

1. The unfair labor practice proceeding

The record is devoid of probative evidence that the discharge of Respondent's entire employee complement on February 11, 1983, and the simultaneous change in Respondent's method of remuneration for their services was motivated by the employees' union activity. Indeed, the complaint does not allege that the discharge of the entire crew was unlawful, but merely alleges the discharges of Harold Sanders and George Sanders to be unlawful. Abundant and convincing record evidence shows, and I find, that the announced and immediately rescinded discharge of the installers was solely motivated by Gordon Buley's understandable reaction to the employees' persistent harassment of and insubordination toward their newly appointed supervisor, Donald Hanson.

Gordon Buley admitted seeking replacement employees the evening of February 10, and both the General Counsel and counsel for the Union argue in their briefs that this substantiates their contention that in fact the discharge of the employees was contemplated prior to the incident between Hanson, Stong and Harold Sanders the morning of February 11. Buley was not asked to explain his reasons for attempting to find replacements the evening of February 10, and the record regarding this matter is exceedingly sparse and incomplete. It is reasonable to assume under the circumstances, however, that Buley was concerned that the employees would not agree to work on a piecework basis, as indeed Wright had earlier indicated this to him, and that therefore he needed to insure that replacements would be available.

Due to the insufficiency of the record, I do not conclude that this evidence supports the General Counsel's contention that on February 10 Buley was aware of the employees' union activity. The record clearly shows that the change from salary to piecework had been contemplated prior to any union activity, and there is no probative evidence that Buley was aware of the union activity prior to the introduction of the piecework concept to the employees on the morning of February 11. Indeed, the various conversations with the employees thereafter, during which Buley was informed of the union activity, provide convincing evidence of this, as nothing he said during the course of those six or eight conversations indicated that he had knowledge of such activity prior to the time Hammond apprised him of it. Moreover, given Buley's impulsive disposition, demonstrated by the abrupt discharge of the entire crew, it is unlikely that he would have been circumspect regarding the employees' union activity had he known about it.

The record contains testimony by Michael Stong and Daniel Wright which the General Counsel contends is probative of Respondent's alleged antiunion motive for terminating Harold Sanders. Thus, during his private meeting with Stong on February 11, Buley stated that Sanders was the union instigator, that he didn't like instigators, and that Stong would probably no longer be working with Sanders, who was Stong's partner for installations. However, Sanders was not discharged and worked on the next day, Saturday. Moreover, according to the testimony of Harold Wright, Sanders and Stong were again assigned by Buley to work as partners on an installation under the new piecework system on Monday, February 14. Given this sequence of events, the intent or meaning of Buley's statement to Stong is far from apparent.

Also, on Wednesday, February 16, Buley abruptly exclaimed to Wright, during the course of an unrelated discussion concerning work, that Harold Sanders was an instigator and that he was going to get rid of Harold Sanders because he just couldn't have people like that around him. This statement, however, must be placed in the proper context. Thus, on February 15, Sanders insulted and was insubordinate to Hanson, calling him, I find, Buley's "suck-suck moron," rather than a "broom pusher" as Sanders testified. I further credit Hanson and Buley and find that on Wednesday, February 16, when Sanders again berated Hanson and questioned his authority to assign work, Buley told him he need no longer call in for work if he persisted in maintaining that type of attitude. Apparently, insofar as the record indicates, Sanders' phone conversation with Hanson and Buley preceded Buley's outburst to Wright regarding Sanders, as the employees had been instructed to phone in early in the morning. The subsequent statement to Wright, therefore, may be reasonably interpreted as an exhibition of renewed pique with Sanders because of his insubordinate behavior and as the suspected instigator of the employees' collective harassment of Hanson, rather than because of Sanders' union activity. Moreover, Buley's statement to Wright corroborates Buley's testimony that he had not previously discharged Sanders during the conversa-

tion, as he told Wright he was going to get rid of Sanders. I specifically discredit Sanders to the extent that his testimony regarding the February 15 and 16 conversations differs with the credible testimony of Hanson and Gordon Buley. Further, as Sanders admittedly did not call in for work following that conversation, and did not seek work with the Respondent thereafter, it is reasonable to infer, and I conclude, that in fact he quit his employment with Respondent and was not an employee on the date of the election.

Additionally, I discredit Sanders' account of his private meeting with Gordon Buley on February 11, and find that Buley did not tell him that he would close the doors of the Company before he would let the Union come in. The record does not show that Buley made any similar remarks to any other employees, or otherwise engaged in any similar violations of the Act. Under the circumstances, I credit Buley's specific denial that he made this statement. I shall therefore also dismiss this allegation of the complaint.⁴

I further find that the Respondent's failure to provide work for George Sanders after February 15 was because, as Hanson credibly testified, Sanders never called in for work subsequent to about February 14. Nor was he contacted for employment by Respondent because, as Steven Buley and Gordon Buley credibly testified, and as the record clearly shows, Sanders' foul language made him an undesirable employee who would not hesitate to use inappropriate language when customers were present. Finally, I credit Gordon Buley and find that he had no meeting with George Sanders 2 or 3 weeks following February 11.

On the basis of the foregoing, I conclude that the General Counsel has failed to prove by the necessary preponderance of evidence that the Act has been violated as alleged, and I shall dismiss the complaint in its entirety.

2. The representation proceeding

The union's election objections are identical to the unfair labor practice allegations and, similarly, for the reasons set forth above, are deemed to be without merit.

⁴ Even assuming arguendo that Buley made the statement, it was allegedly uttered prior to the date the petition was filed and would therefore not constitute a meritorious election objection. *Ideal Electric Co.*, 134 NLRB 1275 (1962).

Regarding the challenged ballots, the parties are in agreement that Donald Hanson is a supervisor, and the challenge to his ballot is sustained. As I have found that Harold Sanders and George Sanders were not employees on the date of the election, the challenges to their ballots are also sustained. Mark Overstreet testified that he left Respondent's employ in about mid-April 1983. As he was therefore not employed on the date of the election, the challenge to his ballot is sustained.

The parties stipulated that Jerry Elder was hired on February 22, 1983 and left Respondent's employ on June 13, 1983. He performed installation work as well as janitorial duties. As the record indicates that his job duties were encompassed within the agreed-upon unit description, and that he was employed on the date of the election, March 30, 1983, the challenge to his ballot is overruled and his vote should be counted.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent has not violated the Act as alleged.

Based on these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁵

ORDER

The complaint is dismissed in its entirety.

IT IS FURTHER RECOMMENDED that the Board remand the representation proceeding to the Regional Director for Region 19 for the purpose of opening and counting the determinative challenged ballot of Jerry Elder, and thereafter issuing an appropriate certification.

⁵ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.